

REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MERU
CIVIL APPEAL NO. E088 OF 2025

PHINEAS KAIREMIA MUTHUI.....

.....APPELLANT

VERSUS

JONATHAN KIMATHI (*Suing as the legal representative of the estate of Douglas Kimathi - Deceased*).....

RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. E.K. Chesoni (RM) in Maua CMCC No. E345 of 2024 delivered on 28th of March, 2025).

JUDGMENT

1. This Appeal arises from the judgment of the learned Resident Magistrate Hon. E.K. Chesoni delivered on 28.3.2025 in Maua Civil Suit No. E345 of 2025 wherein judgment was entered in the following terms;

- a) Liability 80%.**
- b) Pain and Suffering Ksh. 50,000.**
- c) Loss of Expectation of Life Ksh. 100,000.**
- d) Loss of Dependency Ksh. 4,288,000.**
- e) Special Damages Ksh. 286,918.**

2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 25th April, 2025;

1. The Honourable Trial Court erred in law and fact by condemning the appellant to a higher apportionment of liability despite there being evidence to the contrary on record.

2. The Honourable Trial Court erred in fact and law as respects the assessment of general damages for loss of dependency by awarding damages where no dependant under the Fatal Accidents Act had been pleaded and proved.

3. The Honourable Trial Court erred in law and fact by awarding a manifestly excessive amount in General damages for Loss of Expectation of life, which amount was not within the range of conventional awards and as such arrived at an erroneous figure.

Evidence at trial

3. **PW1 P.C Julius Mwita** from Maua Police Station, produced the police abstract and the post mortem report in respect of the deceased, who was involved in an accident on 7/5/2024. He did not visit the scene because he was not the investigating officer.

4. **PW2 Jonathan Kimathi**, the Respondent herein and an uncle to the deceased, adopted his witness statement dated 2/7/2024 as his evidence in chief and produced the list of documents filed therewith as exhibits. He told the court that he did not witness the accident, as he was not at the scene. He was aged 51 years, while the deceased was 40 years old. He gave parental guidance and care to the deceased upon the death of his parents, and the deceased succumbed to the injuries he sustained as a result of the Appellant's negligence.

5. **PW3 James Mwenda**, a brother of the deceased, adopted his statement dated 2/7/2024 as his evidence in chief. He stated that his uncle, the Respondent herein, took care of him and the deceased after the death of their parents.

6. **DW1 Martin Muguna Muthee**, the Appellant's driver, adopted his witness statement dated 14/11/2024 as his evidence in chief and produced the documents filed therewith as exhibits. He told the court that on the material day, he was transporting goods from Kaithe Market and on reaching Kangeta, there was a person walking along the road while staggering. He swerved the vehicle to his right to avoid hitting the person, but the person staggered and hit the vehicle on the left rear side and was injured. He rushed him to Guardian Hospital and proceeded to Kangeta police station to make a report.

7. **DW2 Clifford Kimathi**, a conductor of motor vehicle registration No. KCA 569 L, Isuzu NPR Lorry and an employee of the Appellant, produced his statement dated 14/11/2024 as his evidence in chief. He told the court that, on the material day, they met a pedestrian at Kangeta staggering along the way, and DW1 swerved the vehicle to the right, but the pedestrian hit himself on the left rear side of the vehicle and fell on the road.

Submissions

8. The Appellant, through the firm of J. M Mwangi & Co. Advocates, filed submissions dated 16/9/2025, citing **Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**, on the duty of a first appellate court. Counsel argued that negligence against the Appellant was not proved and prayed for the

dismissal of the suit with costs. Counsel contended that brothers and sisters are not dependants within the meaning of the Fatal Accidents Act, and cited **John Mungai Kariuki & another v Kaibei Kangai Ndethiu & 2 other [2020] eKLR**.

9. The Respondent, through the firm of TMM Advocates, filed submissions dated 19/9/2025. Counsel submitted that a driver has a higher duty of care to other road users and pedestrians, and cited **Bash Hauliers Limited v Anastacia Ndinda Kimonye (Civil Appeal No.150 of 2019) eKLR and Samuel Munyanzi Mugendo v Wickliffe Omboto [2021] KEHC 1571 (KLR)**.

Counsel asserted that the Respondent and PW3 were the only dependants of the deceased who were entitled to compensation, and cited **John Mungai Kariuki & another v Kaibei Kangai Ndethiu & 2 others [2020] KEHC 5379 (KLR); Dismas Muhami Wainarua v Sapon Kasirimo Maranta (suing as administrator and or personal representative of the estate of Partinini Sapon (Deceased) [2021] KEHC 8500 (KLR); Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR) and Chunibhai; J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749.**

Analysis and Determination

10. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.

11. In **Selle & another v Associated Motor Boat Co. Ltd [1968] EA**, the court held as follows: ***“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has***

neither seen nor heard the witnesses and should make due allowance in this respect.”

12. I have considered the appeal herein, the trial court’s judgment which is the subject of this appeal as well as the submissions by Counsel.
13. From the grounds of appeal, the twin issues for determination are whether the apportionment of liability at 80:20 was justified and whether the awards for loss of dependency and loss of expectation of life were excessive.
14. The age-old principle of law is that he who alleges must prove.
15. On liability, the crucial evidence on the causation of the accident was adduced by DW1 and DW2, the eyewitnesses herein. DW1 and DW2, the Appellant’s driver and conductor, respectively, maintained that the deceased staggered onto the road when he was hit despite every effort being made to avoid the accident. DW1 was categorical that, albeit swerving to the right, the deceased staggered onto the road, thus hitting the vehicle on the rear side.
16. The only reasonable inference I draw from DW1’s admission that the road conditions were good and he had clear visibility ahead, is that he was driving at

a relatively high speed, and hence, he was unable to avert the accident, notwithstanding his attempt to swerve.

17. Conversely, I find that the deceased was contributorily negligent, having staggered onto the road, utterly oblivious of the danger he was posing not only to himself but also to other road users.

18. In **Hussein Omar Farah v Lento Agencies [2006] KECA 388 (KLR)**, the Court of Appeal espoused that; ***“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame...The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.”***

19. Consequently, I find that the trial court’s apportionment of liability at 80% was erroneous and unsupported by the evidence led.

I am satisfied that both DW1 and the deceased were equally to blame for the accident, and liability is hereby apportioned at 50%.

20. On loss of expectation of life, it is trite that the conventional figure awardable under this head is Ksh. 100,000, which is what the trial court awarded.

21. On loss of dependency, it is apparent that the Respondent herein and PW2, the uncle and brother of the deceased, respectively, are not dependants within the meaning of **Section 4 (1) of the Fatal Accidents Act.**

22. Nonetheless, as can be deduced from the pleadings, the Respondent's claim was for damages for lost years under the Law Reform Act, as opposed to damages for loss of dependency under the Fatal Accidents Act.

23. The Respondent pleaded at paragraph 11 of the plaint that, ***"The nature of claim in respect of which damages are sought under The Law Reform Act Cap 26 is as follows: -***

a) At the time of his demise, the deceased was aged 40 years old. He enjoyed good health. He was hardworking and earned a basic salary of Ksh. 11,000/- added allowances and statutory deductions, the deceased too home Ksh. 24,000/- monthly. He financially supported his uncle/guardian, the plaintiff herein as well as his younger brother."

24. Section 2 (5) of the Law Reform Act provides that, ***“The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act (Cap. 32) or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action***

against the estates of deceased persons’ shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1). ”

25. The award of lost years under the Law Reform Act was extensively discussed in ***Njoroge & another v Mohamed (Suing as the personal representative of the Estate of Ibrahim Omar - Dcd) & 2 others [2025] KEHC 2009 (KLR)***, where the court (W. Musyoka J) expounded that, ***“The other claim allowable or damages awardable under the Law Reform Act is for lost years, awarded to the estate of a deceased person to compensate the estate for the loss in income it would have benefited from had the deceased lived...The claim would be for compensation for loss of earning capacity between the date of the death of the deceased and the date of his anticipated death from natural causes. The lost income***

would be in respect of what he would have spent on himself, rather than what he would have spent on others, meaning dependants. What he would have spent on himself would be a claim accruing to the estate, under the Law Reform Act, while what he would spent on others would be a claim accruing to dependants, under the Fatal Accidents Act. Where an award is made for lost years under the Law Reform Act and for loss of dependency under the Fatal Accidents Act, both going to dependants, the principle would be that the award under the Law Reform Act be subtracted from that under the Fatal Accidents Act. It is this principle that makes the claim quite rare, given that in fatal claims, suits would be brought under both statutes, and rather than make a claim whose award would subsequently be taken away, parties often choose not to claim for lost years, instead preferring to stick to loss of dependency.”

26. The Respondent proved that the deceased worked at Kiegoi Tea Factory, where he earned a net salary of Ksh. 26,800 as at March 2024.

27. The record shows that the deceased was aged 40 years at the time of his death, and he would reasonably be expected to work until retirement. I consider a multiplicand of Ksh. 26,800, a multiplier of 20 years, a dependency ratio of $\frac{1}{3}$ as appropriate, in the circumstances. The award under this head will thus be Ksh. $26,800 \times \frac{1}{3} \times 20 \times 12 = \text{Ksh. } 2,144,000.$

28. In conclusion, I find that the appeal is partially merited and it is hereby allowed in the following terms:

- a) Liability is apportioned at 50% in favour of the Appellant against the Respondent.**
- b) The award of damages of Ksh. 4,288,000 for loss of dependency is hereby set aside in its entirety.**
- c) The Respondent is awarded Ksh. 2,144,000 for lost years.**
- d) The other awards remain unchanged.**
- e) Each party to bear own costs of the Appeal.**

DATED AND DELIVERED AT MERU THIS 14TH DAY OF APRIL, 2026.

S.M. GITHINJI- JUDGE
14/4/2026

In the presence of:-

Mr. Thuku Mbaaro for the Appellant

Mr. Mwendwa for the Respondent.